



Commonwealth of Massachusetts State Ethics Commission

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SUFFOLK, ss.

COMMISSION ADJUDICATORY
DOCKET NO. 455

IN THE MATTER OF P.J. KEATING COMPANY

DISPOSITION AGREEMENT

This Disposition Agreement (Agreement) is entered into between the State Ethics Commission (Commission) and P.J. Keating Company (Keating) pursuant to Section 5 of the Commission's **Enforcement Procedures**. This Agreement constitutes a consented to final order enforceable in the Superior Court, pursuant to G.L. c. 268B, §4(j).

On September 11, 1991, the Commission initiated, pursuant to G.L. c. 268B, §4(j), a preliminary inquiry into possible violations of the conflict of interest law, G.L. c. 268A. The Commission has concluded its inquiry and, on September 10, 1992, found reasonable cause to believe that Keating violated G.L. c. 268A, §3, through the acts of its employees.

The Commission and Keating now agree to the following findings of fact and conclusions of law:

1. Keating is an asphalt manufacturing and construction corporation doing business in Massachusetts. During the times here relevant, a substantial portion of Keating's business consisted of municipal paving contracts.

2. In the Town of Winchendon, the town paving contract (herein after referred to as "the contract") is put out to bid and awarded annually by the selectmen. The contract covers Winchendon's paving needs for a 12 month period.

3. At all times here relevant, Michael Murphy (Murphy) was the Winchendon Department of Public Works (DPW) superintendent. As such, Murphy was a municipal employee as that term is defined in G.L. c. 268A, §1.

4. As the DPW superintendent, Murphy is responsible for the maintenance and reconstruction of the town roads in Winchendon and for the operation of the Winchendon Highway Department. As the DPW superintendent, Murphy also participates in the annual bidding and contract award process. Winchendon annually advertises the availability of the contract. When the bids are received, Murphy reviews them and makes a recommendation to the selectmen. The contract is generally awarded to the lowest bidder. After the contract is awarded, Murphy is responsible as the DPW superintendent for determining town paving needs covered by the contract (i.e. for ordering paving and/or paving materials pursuant to the contract) and for overseeing the contractor's performance of its obligations under the contract.

5. In June 1987, Keating submitted the low bid for the Winchendon contract. Murphy reviewed the bids and recommended the selectmen award the contract to Keating, which they did on June 22, 1987. Murphy supervised Keating's performance of the contract.^{1/} Thus, he insured that the proper thickness of asphalt was laid down, signed delivery slips acknowledging the town's receipt of specified amounts of materials, and reviewed and approved Keating's bills regarding the materials delivered.

6. At some point in 1987, Murphy approached one of Keating's employees (who was involved in paving Winchendon streets pursuant to the contract) and asked him if Keating would pave Murphy's driveway at his personal residence in Winchendon.

7. On the morning of July 29, 1987, Keating did a certain amount of paving in Winchendon pursuant to the contract. After completing that paving, Keating employees went to Murphy's house, waited for the asphalt material to be delivered from the Keating plant and then paved Murphy's driveway.

8. Approximately 60 tons of asphalt materials were used to pave Murphy's driveway at a fair market cost of approximately \$2,000 (labor and materials).

9. Murphy never expected to pay nor was he ever billed by Keating for the driveway. Keating absorbed the material and labor costs associated with Murphy's driveway.^{2/}

10. In giving Murphy a free driveway, Keating employees were motivated in part by the fact that Murphy was the Winchendon DPW superintendent who, as such, had and would perform official acts regarding Keating's paving contracts with the town.

11. Section 3(a) of G.L. c. 268A, prohibits anyone from, directly or indirectly, giving a municipal employee anything of substantial value for or because of any official act performed or to be performed by the municipal employee. Anything with a value of \$50 or more is of substantial value for §3 purposes.^{3/}

12. By giving Murphy a free driveway, while Murphy as the Winchendon DPW superintendent was supervising Keating's contract performance, and where Murphy was involved in and would be involved in contract awards in which Keating was or would be a bidder, Keating employees gave Murphy an item of substantial value for or because of Murphy's official acts performed or to be performed by him.^{4/}

13. As a corporation, Keating acts through and is responsible for the acts of its agents and employees. This conclusion applies even if these acts are unauthorized. Thus, Keating violated G.L. c. 268A, §3(a) when its employees provided Murphy with the free driveway, notwithstanding Keating's claim that their policy prohibited gratuities to public officials and that the act was not authorized by that policy.^{5/}

In view of the foregoing violations of G.L. c. 268A, §3(a), the Commission has determined that the public interest would be served by the disposition of this matter without further enforcement proceedings, on the basis of the following terms and conditions agreed to by Keating:

1. that Keating pay to the Commission the sum of two thousand dollars (\$2,000.00) as a civil penalty for violating G.L. c. 268A, §3(a);
2. that Keating undertake measures, agreeable to the Commission, to assure that in the future no gratuities be given by Keating or by any of Keating's agents, officers or employees to any Massachusetts state, county, or municipal employee or official in violation of §3; and
3. that Keating waive all rights to contest the findings of fact, conclusions of law and terms and conditions contained in this Agreement in this or any other related administrative or judicial proceedings to which the Commission is or may be a party.

Date: October 20, 1992

^{1/}Keating received the following amounts from Winchendon for street paving: FY 87 - \$229,554.86; FY 88 - \$203,745.16; FY 89 - \$52,711.17; and FY 90 - \$56,824.22.

^{2/}The Town of Winchendon did not pay for either the materials or the labor involved in Murphy's driveway.

^{3/}See *Commonwealth v. Famigletti*, 4 Mass App. 584 (1976).

^{4/}As the Commission stated in *In re Michael*, 1981 SEC 59, 68,

A public employee need not be impelled to wrongdoing as a result of receiving a gift or a gratuity of substantial value in order for a violation of Section 3 to occur. Rather, the gift may simply be an attempt to foster goodwill. All that is required to bring Section 3 into play is a nexus between the motivation for the gift and the employee's public duties. If this connection exists, the gift is prohibited. To allow otherwise would subject public employees to a host of temptations which would undermine the impartial performance of their

duties, and permit multiple remuneration for doing what employees are already obligated to do — a good job.

⁵²*See In re Ackerley*, 1991 SEC 518 (corporation liable for agent's act under §3 even if unauthorized or against corporate policy).